# Access to justice: will the costs regime in the Federal Court change?

The *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* (Cth) (the Bill) is currently before the Senate. It is the subject of a report published by the Senate's Legal and Constitutional Affairs Legislation Committee on 17 September 2009.

The Bill represents changes which are likely to come into effect in the near future. The amendments of most relevance to practitioners relate to case management procedures in the Federal Court, in particular, the insertion of a new Part VB of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act). This includes an 'overarching purpose',[2] which is consistent with the 'overriding purpose' in s 56 of the *Civil Procedure Act 2005* (NSW), obligations on parties and practitioners to act consistently with the 'overarching purpose'[3] and specific powers for the court to give directions about practice and procedure.[4] The Bill also inserts a new sub-section 43(3), setting out some orders that the court may make in regard to costs, although the provision is explicitly stated not to limit the discretion of the court.

The focus for this paper is the implications this legislation may have with respect to the costs regime in the Federal Court, and to the making of costs orders.

There are four provisions of explicit relevance:

- Section 37N(4) – exercise of discretion as to costs *must* take into account 'any failure to comply with' the duty to act consistently with the 'overarching purpose'.
- Section 37N(5) – explicit acknowledgement that a personal costs order may be made against a lawyer pursuant to s 37N(4).
- Section 37P(6)(d) and (e) – costs may be awarded (and may be awarded on an indemnity basis) where a party fails to comply with a direction of the court.
- Section 43(3) – some possible costs orders which may be made by the court.

As can be seen from this brief outline, the effect these provisions are likely to have will depend upon the interpretation of the provisions in Part VB generally.

Arguably, the provisions simply restate the existing discretion as to costs. However, it seems that the Bill represents an expansion of the parliament's expectations with respect to the exercise of the discretion. To what extent will this change the approach to costs orders?

Under the current s 43 of the FCA Act, the Federal Court has a discretion as to costs but that the general rule is that costs should follow the event.[5] This position is consistent with the position in NSW under the *Uniform Civil Procedure Rules 2005* (NSW).[6] The possible costs orders listed in the new s 43(3) of the FCA Act broadly reflect the current discretion with respect to possible costs orders. In light of this, and in light of the explicit codification of the 'overarching purpose' in the proposed s 37M, it may be surprising that there is no statement of the general rule as to costs.

The expression used in the explanatory memorandum is that the new s 43(3) will 'give greater clarity to the types of costs orders the court can make.'[7] However, it is clear from the provisions of Part VB that the intention is to broaden the discretion as to costs. This is supported by the second reading speech for the Bill.[8] The Senate committee's report provided the particular justification that the discretion as to costs required reform where public interest litigants are concerned.[9]

This is of real concern given the history of the costs discretion in the United Kingdom where there is also a broad discretion as to costs.[10] This has resulted in a fact-based approach to costs which has increased uncertainty with respect to awards.[11] Arguably, that uncertainty has increased the incidence of satellite litigation as to costs.[12]

Such uncertainty and associated satellite litigation has real ramifications for clients, especially clients for whom litigation outcomes will significantly influence commercial decisions. While it may be reasonable to review the discretion in cases involving public interest litigants, this is not a sufficient reason to increase uncertainty in cases which do not involve such litigants, especially in purely commercial cases. Further, the 'clarity' referred to by the attorney-general would not be undermined by a legislative statement of the general rule.

Interpretation of s 43(3) is likely to be influenced by current judicial culture. Practitioners in the Federal Court can take comfort from the fact that the courts in the United Kingdom were moving towards the fact-based approach to costs found in the UK CPR before those rules were enacted.[13] Conversely, Australian courts tend to interpret case management legislation in a manner which is strongly influenced by common law principles.[14] Section 43(3) leaves room for a judicial statement that the general rule remains, and it is entirely possible that such a statement will be made.

Nevertheless, the intentional lack of a legislative statement of the general rule potentially increases uncertainty as to costs, and this is of concern.

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### Endnotes

1. LLB (UNSW) BCL MPhil (Oxon). The author contributed to submissions made to the Senate Committee by the NSW Law Society's Young Lawyers Civil Litigation Committee. This paper is partly based on her contribution to those submissions.
2. New s 37M.
3. New s 37N.
4. New s 37P.
5. *Hughes v Western Australian Cricket Association Inc* (1986) ATPR ¶40-748; *DSE (Holdings) Pty Ltd v InterTAN Inc* [2004] FCA 1251; (2004) 51 ACSR 555.
6. See r 42.1.

7. Explanatory memorandum to the Bill, [6]. This sentiment is repeated at [40]-[41].
8. Commonwealth, *Parliamentary Debates*, 22 June 2009, 6732, (Robert McClelland, Attorney-General).
9. Legal and Constitutional Affairs Legislation Committee, Senate, *Access to Justice (Civil Litigation Reforms Amendment Bill 2009) [Provisions]*, at [3.84].
10. *Civil Procedure Rules 1998* (UK), r 44.3.
11. Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed, 2006) at [26.56].
12. Zuckerman, above, at [26.1].
13. Zuckerman, above, at [26.39].
14. Consider *Queensland* v *JL Holdings Pty Ltd* (1997) 189 CLR 146. The question remains open as to whether *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (209) 258 ALR 14; (2009) 83 ALJR 951 represents a change in judicial culture in this regard.

# Military justice in the dock

*Lane v Morrison* (2009) 258 ALR 404; [2009] HCA 29

*Lane v Morrison* (2009) 258 ALR 404 is a decision the effect of which was to declare the Australian Military Court (AMC) repugnant to the Constitution.

The AMC was established under the *Defence Force Discipline Act 1982* (the Act), pursuant to amendments made by the *Defence Legislation Amendment Act 2006* (Cth), to replace the long established military justice system of courts-martial. Establishment of the AMC followed an inquiry by the Senate Foreign Affairs, Defence and Trade References Committee, which reported in 2005. In two joint judgments, the High Court recounted the history of the military justice system and the recent developments that precipitated the inquiry, such as challenges in the UK and Canada that centred on whether service tribunals were properly independent and impartial. In both the UK (*Findlay v United Kingdom* (1997) 24 EHRR 221) and Canada (*R v Généreux* [1992] 1 SCR 259) the European Court of Human Rights and Canadian Supreme Court concluded that the courts-martial in their respective jurisdictions violated the requirements of the European Convention on Human Rights (ECHR) and the Canadian Charter of Rights and Freedoms (CCRF) respectively, in that they denied the complainants the right to have charges determined by independent and impartial tribunals. French CJ and Gummow J noted (at [16]) that Art 14(1) of the International Covenant on Civil and Political Rights (ICCPR) is cast in similar terms to those parts of the ECHR and CCRF considered in Findlay and Généreux, and that the Senate inquiry report had emphasised the fact that Australia was a signatory to the ICCPR. The Senate inquiry report recommended the establishment of a permanent military court in accordance with Ch III of the Constitution. The government of the day rejected that recommendation, but agreed instead to establish a non-Ch III court (the AMC).

The facts of this case involved the plaintiff, who at the relevant time was enlisted in the Royal Australian Navy (the RAN), being charged with the offences of 'an act of indecency without consent' contrary to s 61(3) of the Act and assaulting a superior officer, contrary to s 25 of the Act. The court declined to set out any details

of the incident (however, newspapers reporting the case were not so reticent). It was intended that the plaintiff would be tried by the AMC. The first defendant was the military judge assigned to hear the case. The plaintiff sought, inter alia, declaratory relief, including a declaration that the legislation creating the AMC was invalid because it provided for the exercise of the judicial power of the Commonwealth by a body not created in accordance with Ch III of the Constitution.

The AMC was created by s 114 of the Act:

(1) A court, to be known as the Australian Military Court, is created by this Act.

Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.

Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of service tribunal in subsection 3(1).

(1A) The Australian Military Court is a court of record.

(2) The Australian Military Court consists of:

(a) the chief military judge; and